COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1808

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

ALAN DERZON,

PLAINTIFF-APPELLANT,

V.

APPLETON PAPERS, INC., MITSUBISHI PAPER MILLS, LTD., MITSUBISHI INTERNATIONAL CORPORATION AND MITSUBISHI CORPORATION,

DEFENDANTS,

ELOF HANSSON PAPER & BOARD, INC.,

DEFENDANT-RESPONDENT,

NEW OJI PAPER COMPANY, LTD.,

DEFENDANT,

JUJO PAPER COMPANY, LTD., NIPPON PAPER INDUSTRIES COMPANY, LTD., AND KANZAKI SPECIALTY PAPERS, INC.,

DEFENDANTS-RESPONDENTS,

HONSHU PAPER COMPANY,

DEFENDANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Alan Derzon appeals from the grant of summary judgment to Appleton Papers, Inc. (Appleton); Kanzaki Specialty Papers, Inc. (Kanzaki); Elof Hansson Paper & Board, Inc. (Elof Hansson); Jujo Paper Co., Ltd. (Jujo); and Nippon Paper Industries Co., Ltd. (Nippon) (collectively, the defendants), resulting in the dismissal of all of Derzon's claims of conspiratorial price fixing.[1] Derzon also appeals from the trial court's order denying his motion to vacate summary judgment decided in favor of the defendants. Derzon argues that the trial court misapplied the summary judgment methodology and standards in granting summary judgment to the defendants. Our independent review of the

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[1] Derzon appeals from the following judgments issued by the trial court: (1) April 6, 2000, dismissing Appleton Papers; June 7, 2000, dismissing Kanzaki Specialty Papers and Elof Hansson; and June 14, 2000, dismissing Jujo Paper Co. and Nippon. Appleton Papers was dismissed from this appeal pursuant to a stipulation of the parties. Further, Derzon appealed from the summary judgment dismissing his claim against Mitsubishi International Corporation. However, Derzon subsequently filed a motion with this court seeking a voluntary dismissal of his appeal against Mitsubishi, which this court granted.

We also note that Derzon originally named two additional defendants in his complaint – New Oji Paper Company, Ltd. and Honshu Paper Company. New Oji and Honshu filed a joint motion to dismiss for lack of personal jurisdiction, which the trial court granted. Derzon appealed and this court affirmed. *See* ***Derzon v. New Oji Paper Co., Honshu Paper Co. et al.***, No. 99-1368, unpublished slip op. (Wis. Ct. App. Oct. 31, 2000).

record satisfies us that the trial court properly granted summary judgment, and we affirm.

I. BACKGROUND.

¶2 In May 1996, Derzon brought this action alleging that the defendants conspired to artificially inflate the price of thermal facsimile paper (fax paper) between February 1990 and March 1992.[2] During the relevant time period, Derzon operated a law firm as a sole proprietorship. He contends that he purchased thermal fax paper for business use. He originally filed the instant action as an antitrust class action suit on behalf of himself and other fax paper purchasers who bought fax paper during the applicable time period at allegedly inflated prices. However, the trial court denied Derzon's motion for class certification and the case proceeded as an individual action.

¶3 The defendants in this case are manufacturers, distributors and converters of the fax paper allegedly purchased by Derzon. The manufacturers produce the fax paper in rolls approximately forty to fifty inches wide and weighing up to two thousand pounds, which are commonly referred to as "jumbo rolls." Converters purchase these jumbo rolls from the manufacturer and cut the rolls into smaller finished rolls, which are then distributed throughout the world. Derzon asserted that, during the relevant time period, he purchased substantial amounts of the finished fax paper manufactured, distributed and sold by the defendants.

[2] The thermal facsimile paper at issue is a type of specialty paper, treated with a chemical coating that allows it to reproduce an image by transferring thermal energy.

¶4 Derzon alleged that the named manufacturers and converters conspired to artificially raise the price of fax paper and then fraudulently concealed the arrangement from their customers. Derzon asserted that this conduct "constituted a restraint of trade or commerce in violation of [WIS. STAT. § 133.03(1)] which prohibits and makes unlawful combinations, contracts, arrangements, conspiracies or trusts between two or more persons which constitute an unreasonable restraint of trade or commerce." Derzon concluded that, as a direct result of the defendants' illegal conduct, he sustained an injury because he paid more for fax paper than he would have paid absent the defendants' conspiracy.

¶5 The defendants moved for summary judgment, alleging that no genuine issue of material fact existed as to damages because Derzon could not demonstrate that he was injured as a result of the alleged conspiracy. In opposition to the defendants' motion, Derzon offered documentary evidence that established the existence of the defendants' illegal conspiracy to fix prices, and that the illegal overcharges had been passed on to customers. Specifically, Derzon submitted documentation demonstrating that Elof Hansson, Kanzaki and Kanzaki's President, Kazuhiko Watanabe, pled guilty to federal charges of price-fixing, and that they admitted to entering into a nationwide conspiracy to artificially inflate the price of fax paper. In addition, Appleton Papers was indicted on similar charges, but was eventually acquitted. However, Derzon's only evidence of damages was his vague personal recollections that he bought fax paper from a store that was supplied with defendants' papers. The trial court granted the defendants' motion for summary judgment, finding that Derzon offered no satisfactory proof that he actually purchased fax paper from any of the defendants. The trial court observed that:

> there are essentially six steps to the factual proof that [Derzon] is relying on: Number one, that [the defendants] conspired to raise prices for fax paper; number two, that [the defendants] price fixed paper to a converter named Ritterhouse; number three, that Ritterhouse passed this price increase along to its customers; number four, that Ritterhouse's customers included Sam's Club in Milwaukee; number five, that Sam's Club passed the price increase along to its customers; and number six, that Sam's Club customers included … Derzon.

The trial court focused on the sixth step, and concluded that the evidence Derzon submitted was insufficient to establish a genuine issue of material fact that he had purchased fax paper from Sam's Club during the relevant time period. Therefore, the trial court concluded that Derzon failed to show that he had sustained an injury as a result of the illegal conspiracy, and the court granted the defendants' motion for summary judgment.

II. ANALYSIS.

¶6 Our review of a trial court's grant of summary judgment is *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). We use the same summary judgment methodology as the trial court. ***Id.***

> First, the pleadings are examined to determine whether they state a claim for relief. If they do, and if the responsive pleadings join issue, the court must then examine the evidentiary record to determine whether there is a "genuine issue as to any material fact," and, if not, whether a party is thereby entitled to "judgment as a matter of law."

Transportation Ins. Co. v. Hunzinger Constr. Co., 179 Wis. 2d 281, 289, 507 N.W.2d 136 (Ct. App. 1993) (citation omitted). Summary judgment must be granted if the evidentiary material demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶7 Derzon argues that the trial court erred in granting the defendants' motion for summary judgment. Derzon maintains that the trial court failed to apply the proper summary judgment methodology because it failed to view the facts, and all inferences drawn from the facts, in his favor as the non-moving party. *See* ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 566, 278 N.W.2d 857 (1979). Instead, Derzon asserts that the trial court rejected inferences favorable to him, drew inferences that were unfavorable to him and made factual findings which, he contends, contradicted proper summary judgment procedure and constituted reversible error. We reject Derzon's argument.

¶8 Derzon brought this cause of action under WIS. STAT. § 133.03 (1995-96).[3] "Chapter 133 … was created to prohibit any conspiracy resulting in restraint of trade." ***Gerol v. Arena***, 127 Wis. 2d 1, 10, 377 N.W.2d 618 (Ct. App. 1985). To recover for an antitrust violation under § 133.03, a plaintiff must establish both the existence of a price-fixing conspiracy and an injury as a result of the defendant's unlawful conduct. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 346-47, 294 N.W.2d 473 (1980). To establish injury, Derzon contends a plaintiff need only demonstrate that a defendant's conduct caused the injury by showing that the illegal overcharge was passed-on to the plaintiff through the chain of distribution. Derzon points out that the defendants have not contested the existence of a price-fixing conspiracy in their motion for summary judgment — they argue only that

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[3] WISCONSIN STAT. § 133.03 (1995-96), in pertinent part, provides:

> **Unlawful contracts; conspiracies.** **(1)** Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal. Every person who makes any contract or engages in any combination or conspiracy in restraint of trade or commerce may be fined not more than $100,000 if a corporation, or, if any other person, $50,000, or be imprisoned for not more than 5 years, or both.

he failed to prove he was injured as a result of the conspiracy. Derzon asserts that, contrary to the defendants' assertions, he proved his injury because the evidence he submitted shows that the illegal overcharge was passed on to him through the chain of distribution. We disagree.

¶9 After independently reviewing the record, we conclude that the trial court applied the proper summary judgment methodology and correctly granted summary judgment in the defendants' favor. As noted, the trial court found that Derzon was required to establish a six-part chain of distribution in order to recover damages. After considering the pleadings, the trial court found that Derzon's complaint stated a claim for relief and that the defendants' properly filed answers. The court also found that the defendants' motion for summary judgment and supporting papers set out a prima facie defense – "that [Derzon] is unable to prove an essential element of the claim; that is, the existence of an injury."

¶10 The trial court then correctly concluded that the defendants' motion for summary judgment was governed by ***Hunzinger***, which held that the moving party can shift the burden to the non-moving party by alleging that there is no evidence to support the non-moving party's claim. ***Hunzinger***, 179 Wis. 2d at 290-91. The trial court found that the defendants provided documentation and deposition testimony to support their assertion that Derzon had not established any injury which, under ***Hunzinger***, shifted the burden to Derzon to "set forth specific facts showing that there is a genuine issue for trial." WIS. STAT. § 802.08(3) (quoted in ***Hunzinger***, 179 Wis. 2d at 291).

¶11 The trial court then considered Derzon's submissions in opposition to the defendants' summary judgment motion to determine whether he had set forth sufficient evidence of injury to warrant a trial. The trial court found that

Derzon submitted "evidence of a very particular chain of distribution of fax paper," which required Derzon to prove he bought fax paper from Sam's Club. In rejecting Derzon's contention that he provided factual evidence of an injury, the trial court asserted:

> [T]he most glaring problem with the evidence is, in fact, the last step of the chain. And on this basis I believe that [Derzon's] evidence is insufficient to establish any material issue of fact which warrants a trial. And the last step is that Sam's Club customers at some time when one could reasonably find a possible injury did occur, did, in fact, include the Alan Derzon Law Offices.

The trial court found that even viewing the facts presented, and the reasonable inferences drawn from those facts in a light most favorable to Derzon, the possibility that Derzon actually purchased fax paper from Sam's Club did not rise above mere speculation. Therefore, the trial court concluded that there was no genuine issue of material fact and granted the defendant's motion for summary judgment. We agree with the court's analysis.[4]

¶12 Derzon failed to demonstrate that he actually purchased fax paper from Sam's Club during the relevant time period. Derzon relies on his own deposition testimony as evidence that he did, in fact, purchase fax paper from Sam's Club. However, after reviewing Derzon's deposition testimony, this court cannot conclude that he satisfied his evidentiary burden. In his deposition, Derzon testified that his office "normally" bought office materials from Commercial Stationery, but that some materials were occasionally purchased from Sam's Club.

[4] Although the trial court concluded that Derzon failed to create a genuine issue of material fact regarding injury, it briefly addressed the remaining steps in the chain. Because we conclude that the trial court's analysis regarding the sixth step – injury – is dispositive, we will not address the remaining steps. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if decision on one point disposes of appeal, appellate court need not decide other issues raised).

Derzon asserted that his firm has purchased materials from Commercial Stationery since 1988, and that he "assumed" office materials had been purchased from Sam's Club since that time as well. Other than his own vague recollection, Derzon produced no evidence that any fax paper was purchased from Sam's Club. In fact, he produced no evidence that any materials were purchased from Sam's Club. In their brief to this court, the defendants assert:

> Derzon's deposition testimony likewise confirmed his complete inability to proffer any evidence which might tend to show that he suffered an antitrust injury: he could not pinpoint the place of purchase; he lacks any receipts of purchase; he could not testify to any of the amounts paid during the relevant time period; he did not know at what time intervals he bought paper or even whether he bought paper manufactured by one of the [defendants].

¶13 After independently reviewing the record, we agree with the defendants' assertions. Based on this lack of evidentiary support, we are satisfied that the trial court properly concluded that, even considering the facts and inferences in the light most favorable to Derzon, no genuine issue of material fact has been raised showing Derzon suffered an antitrust injury. Therefore, we conclude that the trial court properly granted the defendants' summary judgment motion dismissing Derzon's cause of action.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.